

MIGUEL VALERIO,

Plaintiff,

vs.

PNC MORTGAGE,

Defendant.

ORDER

I. FACTS AND PROCEDURAL HISTORY

1 of 5

1 no modification because the loan beneficiaries had rejected it. (*Id.*). Defendant offered a deed in
2 lieu of foreclosure or a short sale, but Plaintiff does not allege having participated in either of
3 those options. (*See id.*). In July 2014, Defendant notified Plaintiff that there had been some kind
4 of agreement (the allegations here are vague), but it was never consummated. (*See id.* 2–3).
5 Defendant has informed Plaintiff it intends to foreclose. (*Id.* 3).

6 Plaintiff sued Defendant in state court. The Complaint fairly indicates causes of action
7 for intentional misrepresentation and violations of Nevada Revised Statutes section 107.530
8 (2013) (the anti-dual-tracking provision). Defendant removed and moved to dismiss the fraud
9 claim. The Court dismissed the fraud claim, with leave to amend, but Plaintiff has filed no
10 complaint within the time given by the Court to do so. As the Court noted in the previous order,
11 the section 107.530 claim shall therefore proceed alone. Defendant has moved for summary
12 judgment.

13 **II. SUMMARY JUDGMENT STANDARDS**

14 A court must grant summary judgment when “the movant shows that there is no genuine
15 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
16 Civ. P. 56(a). Material facts are those which may affect the outcome of the case. *See Anderson*
17 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if
18 there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See*
19 *id.* A principal purpose of summary judgment is “to isolate and dispose of factually unsupported
20 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). In determining summary
21 judgment, a court uses a burden-shifting scheme:

22 When the party moving for summary judgment would bear the burden of proof at
23 trial, it must come forward with evidence which would entitle it to a directed
24 verdict if the evidence went uncontroverted at trial. In such a case, the moving
party has the initial burden of establishing the absence of a genuine issue of fact
on each issue material to its case.

1 *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations
2 and internal quotation marks omitted). In contrast, when the nonmoving party bears the burden
3 of proving the claim or defense, the moving party can meet its burden in two ways: (1) by
4 presenting evidence to negate an essential element of the nonmoving party's case; or (2) by
5 demonstrating that the nonmoving party failed to make a showing sufficient to establish an
6 element essential to that party's case on which that party will bear the burden of proof at trial.
7 *See Celotex Corp.*, 477 U.S. at 323–24. If the moving party fails to meet its initial burden,
8 summary judgment must be denied and the court need not consider the nonmoving party's
9 evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

10 If the moving party meets its initial burden, the burden then shifts to the opposing party
11 to establish a genuine issue of material fact. *See Matsushita Elec. Indus. Co. v. Zenith Radio*
12 *Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the opposing
13 party need not establish a material issue of fact conclusively in its favor. It is sufficient that “the
14 claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing
15 versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d
16 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid summary judgment
17 by relying solely on conclusory allegations unsupported by facts. *See Taylor v. List*, 880 F.2d
18 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and
19 allegations of the pleadings and set forth specific facts by producing competent evidence that
20 shows a genuine issue for trial. *See Fed. R. Civ. P. 56(e); Celotex Corp.*, 477 U.S. at 324.

21 At the summary judgment stage, a court's function is not to weigh the evidence and
22 determine the truth, but to determine whether there is a genuine issue for trial. *See Anderson*, 477
23 U.S. at 249. The evidence of the nonmovant is “to be believed, and all justifiable inferences are
24

1 to be drawn in his favor.” *Id.* at 255. But if the evidence of the nonmoving party is merely
 2 colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249–50.

3 **III. ANALYSIS**

4 Defendant has adduced evidence negating any claim Plaintiff might have under section
 5 170.530. Defendant has adduced, *inter alia*, copies of two successive pre-notice-of-default
 6 letters it sent Plaintiff listing Plaintiff’s options, (*see* Letters, ECF Nos. 11-3 and 11-4); a copy of
 7 a post-notice-of-default letter responding to Plaintiff’s inquiry by attaching copies of Plaintiff’s
 8 promissory note, deed of trust, and payment history, (*see* Letter, ECF No. 11-7); a copy of a
 9 Making Home Affordable Program (“MHAP”) packet partially filled out by Plaintiff, (*see*
 10 Packet, ECF No. 11-9); a copy of a letter from Defendant to Plaintiff requesting that Plaintiff
 11 complete the packet, (*see* Letter, ECF No. 11-10); and a letter from Defendant to Plaintiff
 12 indicating that Defendant would not proceed with the MHAP program in Plaintiff’s case because
 13 he had not completed the packet, (*see* Letter, ECF No. 11-11).

14 The “anti-dual-tracking” provision of the Nevada Homeowners’ Bill of Rights reads:

15 If a borrower submits an application for a foreclosure prevention
 16 alternative offered by, or through, the borrower’s mortgage servicer or mortgagee
 17 or the beneficiary of the deed of trust, then the mortgage servicer, mortgagee,
 18 trustee, beneficiary of the deed of trust or an authorized agent of such a person
 19 may not commence a civil action for a foreclosure sale pursuant to NRS 40.430
 involving a failure to make a payment required by a residential mortgage loan,
 record a notice of default and election to sell pursuant to subsection 2 of NRS
 107.080 or a notice of sale pursuant to subsection 4 of NRS 107.080, or conduct a
 foreclosure sale until one of the following has occurred:

20 Nev. Rev. Stat. § 170.530(1) (2013).

21 Defendant argues that there was no dual tracking under the meaning of section 170.530,
 22 because the trustee did not record the Notice of Trustee’s Sale until November 20, 2014 (the
 23 document is adduced), which is more than three months after the August 11, 2014 letter denying
 24 any modification. The Court agrees. It is unclear under section 170.530(1) whether a

1 foreclosing entity must exclude time during which a modification application is pending from the
2 regular three months between recordation of the notice of default and notice of sale under section
3 107.080(2)(e). Section 107.530(1) on its face only prohibits the filing of a judicial foreclosure
4 action, the recordation of a notice of default or a notice of sale, or the conduct of a trustee's sale
5 while the modification application is pending. *See* Nev. Rev. Stat. § 107.530(1). It does not on
6 its face exclude time under section 107.080(2)(e). But even if it could be read to do so,
7 Defendant has produced evidence that it in fact waited over ninety days from the rejection of the
8 modification application to record the notice of sale. Also, the notice of default in this case
9 (which is also adduced) was recorded before Plaintiff submitted his application for a
10 modification—the notice of default predates the signature date of the application—so the
11 recordation of that document has been shown not to have been a violation of section 107.530(1).
12 Defendant also negates any claim under section 107.530(2) *et seq.*, because the evidence
13 adduced indicates an incomplete application.

14 Defendant has therefore satisfied its initial burden on summary judgment to submit
15 evidence negating Plaintiff's claim. Plaintiff has adduced no evidence in opposition and has
16 therefore failed to carry his shifted burden to show a genuine dispute of material fact for trial.

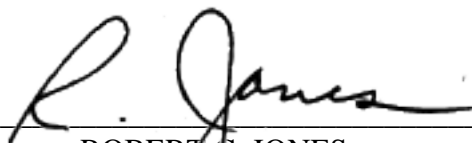
17 CONCLUSION

18 IT IS HEREBY ORDERED that the Motion for Summary Judgment (ECF No. 11) is
19 GRANTED, and the Motion to Stay Discovery (ECF No. 13) is DENIED as moot.

20 IT IS FURTHER ORDERED that the Clerk shall enter judgment and close the case.

21 IT IS SO ORDERED.

22 Dated this 25th day of June, 2015.

23 
24 ROBERT C. JONES
United States District Judge